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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 154

ATLANTIC MEAT COMPANY, INC.,
Petitioner,

vs.

THE RECONSTRUCTION FINANCE CORPORATION
(FORMERLY DEFENSE SUPPLIES CORPORATION)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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To the Honorable Supreme Court of the United States:

The petitioner, the Atlantic Meat Company, Inc., a Massachusetts corporation, respectfully prays that a writ of certiorari issue to review the judgment entered in this case on May 8, 1946 by the United States Emergency Court of Appeals.

Opinion Below

The opinion of the United States Emergency Court of Appeals has not as yet been reported in the Federal Reporter and the page references thereto are to the printed opinion as issued by that Court and contained in the record at pages 33 to 36.

Statement of the Matter Involved

This action arises upon a complaint filed July 14, 1945 in the United States Emergency Court of Appeals against the denial by Defense Supplies Corporation, now Reconstruction Finance Corporation, of plaintiff's protest against the validity of Amendment No. 2 (9 F. R. 1820) issued by Defense Supplies Corporation on October 30, 1943, pursuant to the Directive of the Director of the Office of Economic Stabilization, issued October 25, 1943 (8 F. R. 14641), to its Regulation No. 3, Livestock Slaughter Payments and Livestock Slaughter Payments Regulation No. 3 Revised (10 F. R. 1336) of Defense Supplies Corporation, issued and effective January 19, 1945, under which defendant has ruled that the plaintiff was ineligible to receive the special subsidy of 80¢ per cwt. payable to non-processing slaughterers of cattle.

The complaint raised several objections to the validity of the Amendment and Regulation (R. 15, 16, 17) which in substance are that they (1) Were not in accordance with the Directive of the Director of the Office of Economic Stabilization issued October 25, 1943; (2) Violated Section 2(m) of the Emergency Price Control Act of 1942 as amended by the Stabilization Act of 1942, as amended, by imposing conditions or penalties not authorized by the provisions of that Act or of any Acts, or of any lawful regulation issued thereunder; (3) Were repugnant and contrary to the purposes of said Directive as therein stated, as set forth in the "Explanation of O. E. S. Directive" and as set forth in the press release, O. W. I. Release 2652 which accompanied its issuance; (4) Constituted the administration of a subsidy provision by discretion rather than by law; (5) Were arbitrary, capricious and inquitable in that they defeated the purposes of said Directive and of the Stabilization Act and, when considered in

conjunction with the Price Administrator's Regulation, in aid of which their adoption was procured, did not allow plaintiff and those similarly situated to recover out-of-pocket costs upon the production of beef; and (6) Violated Article V of the Amendments to the Constitution, since they operated, in conjunction with the Price Administrator's Regulation, to deprive plaintiff of its property without due process of law and, in conjunction with the War Food Administrator's set-aside Orders, amounted to a taking of private property for public use without just compensation.

The defendant moved to dismiss the complaint for lack of jurisdiction which was denied by the Emergency Court on the authority of *Illinois Packing Co.* v. *Snyder,* 151 F. (2d) 337, and the defendant was ordered (R. 31) to answer and file a transcript of the material portions of the proceedings, which it did (R. 18-19 and 1-13) on October 13, 1945.

The answer in substance consisted of a general denial together with affirmative allegations that (1) Section 2 of Public Law 68 (undoubtedly meaning Public Law 88) (S. 502), 79th Congress, specifically ratifies and affirms the regulation complained of giving it the force and effect of law; (2) The legality and validity of the regulation complained of has been conclusively established by approval of the Director of Economic Stabilization evidenced by twelve directives issued subsequent to the Directive of October 25, 1943; (3) The provisions of the regulation complained of were authorized by Section 2(e) of the Emergency Price Control Act; (4) The provisions of the regulation complained of are consistent with the October 25 Directive of the Office of Economic Stabilization; (5) The provisions of the regulation complained of are not arbitrary, capricious, *ultra vires* or otherwise unlawful but are reasonable, necessary and duly authorized; (6) Plaintiff has not shown

that for six consecutive months in 1942 it sold 98% or more, dressed carcass weight, of its total beef in the form of carcasses, wholesale cuts, boneless beef or ground beef; (7) Defendant believes that from November 1, 1943 to March 31, 1944 plaintiff was owned by General Foods Corporation which during that period owned Batchelder & Snyder Company, Inc., a processor or purveyor of meat, and that thereafter plaintiff was owned by Batchelder & Snyder Company, Inc.

The case was argued in Boston on December 21, 1945, before a division of the Court consisting of Chief Judge Maris, Judge Magruder and Judge McAllister and on May 8, 1946, a judgment was entered dismissing the complaint together with an accompanying opinion expressly based upon the case of *Earl C. Gibbs, Inc.* v. *Defense Supplies Corp. et al.* (R. 34-35), not yet reported in the Federal Reporter, but being No. 226 on the docket of the Emergency Court of Appeals and decided, with McAllister J. dissenting, on the same day. On May 17, 1946 a petition, assented to by counsel for the defendant, was filed for clarification and enlargement of the opinion (R. 37), to avoid the prejudicial effect of an incomplete presentation of the profit position of the plaintiff considered in conjunction with its affiliate and to disclose that it derived no "profit, either direct or indirect, from processing operations in the broad sense," see *Atlantic Meat Company, Inc.*, v. *Reconstruction Finance Corporation* (E. C. A. decided May 8, 1946) (R. 35) by including the unquestioned facts that regardless of its affiliation with Batchelder & Snyder, "a processor of meat within the meaning of Amendment No. 2," the combined operations of the two on beef from July, 1943, through February 15, 1945, showed a loss of $553,845.66, while the combined operations of the two including all departments of, and commodities sold by, its affiliate showed a loss dur-

ing such period of $161,078.14 (R. 9). This petition was denied by order entered May 28, 1946 (R. 38).

Jurisdiction

Jurisdiction to review this cause exists under Section 204 (d) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App., Section 924 (d)).

The date of entry of judgment in the cause sought to be reviewed was May 8, 1946 (R. 36). The judgment was rendered by the United States Emergency Court of Appeals.

Questions Presented

The following questions are presented:

1. Did the Emergency Court of Appeals have jurisdiction to determine the validity of Amendment No. 2 to Defense Supplies Corporation's (now Reconstruction Finance Corporation's) Regulation No. 3?

2. Under what authority are the beef subsidy payments made?

3. Can the Emergency Court of Appeals assume jurisdiction to pass upon questions over which Congress, by Section 2 (m) of the Emergency Price Control Act, as amended by the Stabilization Extension Act of 1944 (50 U. S. C. A. App. Section 902 (m)), has specially given jurisdiction to the United States District Courts?

4. Did Defense Supplies Corporation have the power to modify, or deviate from, the directives on policy issued by the Director of the Office of Economic Stabilization under authority of Executive Orders No. 9250 and No. 9328?

5. Did the Amendment and Regulation which incorporated it comply with the Directive on policy so issued on October 25, 1943, by the Director of the Office of Economic Stabilization?

6. If the Amendment were valid when issued, does its interpretation and application by the defendant in conjunction with Revised Maximum Price Regulation No. 169 and the War Food Administrator's set-aside Orders, violate Article V of the Amendments to the Constitution?

Reasons Relied upon for Allowance of Writ

1. The United States Emergency Court of Appeals has by its decision in this cause assumed and enunciated a novel and important question of law pertaining to its jurisdiction. It has assumed jurisdiction to pass upon the validity of a regulation issued by Defense Supplies Corporation although Congress, which created that Court and delineated its jurisdiction in the Emergency Price Control Act, did not include jurisdiction over regulations issued by Defense Supplies Corporation or any agency other than the Office of Price Administration.

Although this question was not raised in the final argument in this cause before that Court, it is a fundamental precept of law that a court cannot acquire jurisdiction of a subject matter over which it lacks jurisdiction under the authority creating it by any consent or waiver of the parties. See *United States* v. *Griffin*, 303 U. S. 226, *Thomas* v. *Ohio State University*, 195 U. S. 207, *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62. The question of jurisdiction had previously been raised by the defendant, but its motion to dismiss had been denied (R. 31) upon the authority of *Illinois Packing Co.* v. *Snyder*, 151 F. (2d) 337 (R. 53) upon the theory that the amendment, the validity of which was under consideration, had been issued under Section 2 (e) of the Emergency Price Control Act.

If this amendment had been issued under Section 2 (e) of the Price Control Act, the Emergency Court of Appeals would have had jurisdiction over any question as to its

validity. However, if it were issued under such section it would have had to be preceded by a determination by the Federal Loan Administrator, with the approval of the President, or the Secretary of Commerce to whom the Federal Loan Administrator's functions, powers and duties were transferred by Executive Order 9071 (7 F. R. 1531) (50 U. S. C. A. App. Section 601), since meat had been defined as a strategic or critical material by the President.

The fact that meat had been defined by the President as a "strategic or critical material" has been frequently recognized by the Court below, see *Illinois Packing Co.* v. *Bowles*, 147 F. (2d) 554, 558. And in the same case that Court concludes "without hesitation, that Amendment No. 2 is a regulation or order issued under Section 2 (e) of the Emergency Price Control Act." That Court further recognizes, as fully set out on page 7 of its opinion in the *Gibbs* case (*Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation and Reconstruction Finance Corporation*, E. C. A., May 8, 1946), that

> "It is true that Defense Supplies Corporation is merely a paying or disbursing agent, and that authority to formulate a program of meat subsidies is vested in the Federal Loan Administrator, subject to the overriding authority of the Director of Economic Stabilization. Amendment No. 2, containing the affiliation provisions, was issued by the Defense Supplies Corporation. We are not at liberty to consider a possible technical objection that the conditions of eligibility for the special subsidy, as prescribed in Amendment No. 2, should have been traced to a determination made by the Federal Loan Administrator, for no such objection was contained in the protest. In addition it would be highly unrealistic to suppose that Defense Supplies Corporation, which falls under the supervision and control of the Federal Loan Administrator (55 Stat. 1429-30), went off on a frolic of its own in this matter."

The Court was not only "at liberty to consider" • • • this

> "possible technical objection that the conditions of eligibility for the special subsidy, as prescribed in Amendment No. 2, should have been traced to a determination made by the Federal Loan Administrator"

(or the Secretary of Commerce as above recited), but was bound to do so if it claimed jurisdiction over the question of the validity of the amendment on the theory, which was its sole theory, that that amendment was issued under Section 2 (e) of the Act. It could only have jurisdiction over the subject matter if this amendment were issued under Section 2 (e) of the Act and that amendment could only have been so issued if the Federal Loan Administrator (later the Secretary of Commerce) had previously made his determination with the approval of the President, that it was "necessary to obtain the maximum necessary production" of meat.

The responsibility resting on the Federal Loan Administrator (later the Secretary of Commerce) could not have been delegated. The courts have often held that delegated responsibility and discretion cannot be redelegated informally and casually and there certainly was no formal delegation. The fact that the Federal Loan Administrator had been the same individual who was the then Secretary of Commerce and also Chairman of the Board of Defense Supplies Corporation, does not in the eyes of the law or in the eyes of Congress, which had delegated certain powers to him as Federal Loan Administrator, sanction the casual theory of subdelegation which the Court below seems to imply from feeling it

> "highly unrealistic to suppose that Defense Supplies Corporation which falls under the supervision and con-

> trol of the Federal Loan Administrator * * * went off on a frolic of its own in this matter."

In this connection reference is made to 42 American Jurisprudence, Public Administrative Law, Section 73, where it is stated:

> "It is a general principle of law, expressed in the maxim '*delegatus non potest delegare*', that a delegated power may not be further delegated by the person to whom such power is delegated. Apart from statute, whether administrative officers in whom certain powers are vested may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the other, discretionary or quasi-judicial. Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature."

To like effect is the decision in the case of *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, in which the question arose of the right of the Administrator of the Wage and Hour Division of the Department of Labor, under the Fair Labor Standards Act, to delegate his statutory power to sign and issued a *subpoena duce tecum*. The Court held that in the absence of clear authorization by Congress in support of such subdelegation, the delegation was improper. It stated at p. 361:

> "A construction of the Act which would thus permit the Administrator to delegate all his duties including those involving administrative discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words."

See also *Guiseppi* v. *Walling* (C. C. A. II, 1944), 144 F. (2d) 608.

Any delegation or any determination of general applicability, as either in this case, if made, would have been, would of necessity have had to be published in the Federal Register. See Section 7 of the Federal Register Act (44 U. S. C. A., Section 307) and Section 5 (a) 2 thereof (44 U. S. C. A. Section 305) as well as Title I, Code of Federal Regulations, Sections 1.5 and 2.2. There was no such publication. It follows that there could have been no valid delegation or determination.

2. If, as clearly appears, the contested amendment could not have been issued under Section 2 (e) of the Act since there had been no previous determination as required thereby, the question is posed under what authority this amendment or any similar amendment could have been issued. The question would seem to be easily resolved and in fact the answer is contained in the amendment itself which states that it is issued "Pursuant to a directive issued by the Office of Economic Stabilization on October 25, 1943." The Director's authority stems from Executive Orders No. 9250 (7 F. R. 7871) and No. 9328 (8 F. R. 4681) which were issued by the President under the authority conferred upon him by the Stabilization Act of 1942 (Oct. 2, 1942, C. 578, 56 Stat. 765).

It has never before been claimed by the Emergency Court of Appeals or by any responsible governmental official or agency that that Court had jurisdiction to determine the validity either of the Stabilization Act, the Executive Orders issued thereunder, the directives of the Director of the Office of Economic Stabilization or any regulations issued pursuant thereto.

3. By Section 2 (m) of the Act

> "No agency, department, officer, or employee of the Government, in the payment of sums authorized by this

> or other Acts of Congress relating to the production or sale of agricultural commodities * * * shall impose any conditions or penalties not authorized by the provisions of the Act or Acts, or lawful regulations issued thereunder * * * (and) Any person aggrieved by any action of any agency, department, officer, or employee of the Government contrary to the provisions hereof, * * * may petition the district court * * * for an order or a declaratory judgment to determine whether any such action or failure to act is in conformity with the provisions hereof and otherwise lawful; and the court shall have jurisdiction to grant appropriate relief."

By the last paragraph of the Court's opinion (R. 35) the Court has appropriated to itself the jurisdiction thus conferred by Congress upon the United States District Courts by regarding "as a much too narrow reading of the regulation" the argument that the imposition by the defendant of the condition that a non-processing slaughterer becomes disentitled to the special subsidy because it is under common control with a "processor" (even with a fabricator rather than processor) constituted a condition or penalty not authorized by the provisions of the Act or Acts, or lawful regulations issued thereunder.

It is admitted (R. 13) that from November 1, 1943 to March 31, 1944 the plaintiff was neither owned nor controlled by a processor or purveyor of meat and that it did not own or control such processor or purveyor of meat, but yet the defendant denied plaintiff's claims for this period on the ground that it was "under joint control with a processor of meat." No language in defendant's regulation even suggests any joint control prohibition. The phrase "under common control with" or "under joint control with" is familiar to governmental agencies. They or similar phrases have frequently been used by the Price Administrator in his regulations. For example, see the

definitions in MPR 169, as it existed at the time of defendants' amendment, of "wholesaler" and "independent hotel supply house" where provision is specifically made to exclude one who is

> "owned or controlled, in whole or in substantial part, by another person who owns or controls in substantial part any slaughtering plant or facilities."

The phrase "under joint or common control with" has frequently been used by the Securities and Exchange Commission and was specifically used by Congress in the Renegotiation Act of 1942 (Section 403 of the 6th Supplemental National Defense Appropriations Act of 1942), where sub-section (c)(6) refers to

> "all persons under the control of or controlling or under common control with the contractor or sub-contractor, under contracts with the Departments."

The interpretation of a regulation which contains no such common control provision as if it had contained such, would clearly seem to be the imposition of a condition not authorized by the provisions of the regulation itself or of any Act.

4. The defendant had no power direct or implied to modify, nor discretion in applying, the directives on policy issued by the Director. It was specifically directed by Executive Order No. 9250 Title I Section 4 "to conform". That Directive is clear, and concise. Its definition of the class of persons to whom the subsidy was to be paid, and the terms under which payment was to be made, are complete. If the Director had intended that Defense Supplies Corporation was to exercise discretion in implementing and varying the terms of the Directive, he could easily have done so. In fact he gave no express authority to utilize discretion. The completeness and directness of the lan-

guage actually used by him further denies the existence of any implied power on the part of the defendant to depart from and vary the terms of the Directive, as it has actually done by the terms of the regulation now in controversy.

It is axiomatic that the power of an administrative agency to prescribe rules and regulations governing the operation of the agency under the statute or power which gave the general basic authority to act, is definitely limited by that general basic authority. Under the guise of rule making the basic purpose and authority can be neither reduced, extended nor in any way modified. *United States* v. *George,* 228 U. S. 14. See also *United States* v. *United Verde Copper Co.,* 196 U. S. 207, which held a rule issued by the Secretary of the Interior defining "other domestic purposes," in the phrase "building, agricultural, mining, or other domestic purposes," as excluding smelting, to be invalid, and said at page 215:

> "If rule 7 (the rule in question) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

In the case at bar the power to establish the qualifications of slaughterers who should receive the special subsidy was certainly not intended to be conferred upon the defendant. It existed only with, as it had been delegated to, the Director.

See also *Walling* v. *Belo Corporation,* 316 U. S. 624, which invalidated a regulation or ruling issued by the Wage and Hour Administrator upon the ground that it constituted an "inflexible and artificial interpretation of

the Act which finds no support in its text" and which as a practical matter operated to negate a clear purpose of the Act.

5. Since there was no authority or discretion vested or inherent in the defendant to modify directly or, under the guise of definition or rule making, indirectly, the comprehensive national policy which the Director was authorized and directed to formulate and disseminate through directives, the question is posed as to whether the amendment complained of did in fact comply therewith. Again the answer seems clear. The pertinent parts of that Directive were:

> "5. Slaughterers who during the year 1942, or a representative portion thereof, sold and who currently sell 98% or more of the total dressed carcass weight of cattle slaughtered by them in the form of carcasses, wholesale cuts, frozen boneless beef (Army specifications) (carcass equivalent) or ground beef, shall be paid in addition to the payments authorized by Regulation No. 3 of Defense Supplies Corporation (Livestock Slaughter Payments), the amount of $0.80 per cwt. of cattle slaughtered during the month for which such payments are made.
>
> "6. Defense Supplies Corporation is directed to amend Regulation No. 3 (Livestock Slaughter Payments) in accordance with this Directive."

Five days later the defendant allegedly acting "Pursuant to" this Directive amended its Regulation No. 3 by issuing Amendment No. 2 which provided in material part as follows:

> "Section 14. Extra Compensation for Non-processing Slaughterers of Beef.
>
> "(a) Definitions.
>
> "(1) 'Non-processing slaughterers of beef' means an unaffiliated slaughterer as hereinafter defined who,

during six consecutive months of 1942, sold, and who currently sells, 98% or more, measured in dressed carcass weight, of the total beef produced from cattle slaughtered by him in all his establishments, in the form of carcasses, wholesale cuts, boneless beef or ground beef.

"(2) 'Unaffiliated slaughterer' means a slaughterer who does not own or control a processor or purveyor of meat, and who is not owned or controlled by a processor or purveyor of meat. 'Unaffiliated slaughterer' shall not include any institution, representative or agency of Federal, State or local governments."

The defendant did not comply with the policy enunciated in the Directive of October 25, 1943. It added the unaffiliated condition herein complained of.

In explaining the policy underlying the Directive of October 25, 1943 the Court below said on page 7 of its opinion in the *Gibbs* case,

> "As explained by the Economic Stabilization Director in his public statement, the general purpose was to afford relief to a group of slaughterers who do not derive profits from further processing operations. It is thus consistent with the policy of the Directive to deny the special subsidy to a non-processing slaughterer affiliated with and controlled by a processing slaughterer—otherwise the benefit of the special subsidy would flow to persons not intended to be benefited *and not needing the special relief.*" (Italics supplied.)

And on page 2 of its opinion in the instant case (R. 34) the Court stated

> "As we explained in *Earl C. Gibbs, Inc.* v. *Defense Supplies Corp. et al.*, No. 226, decided this day, the purpose of the Directive of the Economic Stabilization Director issued October 25, 1943 was to make special provision by way of an extra subsidy to a limited group in the meat industry, namely, to those whose business con-

> sists entirely, or almost entirely, in the sale of dressed carcasses and wholesale cuts from the slaughter of cattle, and who derive no further profit, either direct or indirect, from processing operations in the broad sense."

However, the Court refused to consider, or considering, to give any weight to, and, upon subsequent petition, refused to clarify and enlarge its opinion to include the uncontroverted fact that the plaintiff and its affiliate had no profit whatsoever from their combined beef operations, but in fact lost thereon from July, 1943 through February 15, 1945 a total of $553,845.66 and even lost upon the combined operations of the two, including all departments of, and commodities sold by, its affiliate, a total of $161,078.14 (R. 9, 12, 37).

After reciting that the general purpose of the Directive was to help those slaughterers who needed special relief in order to stay in business and who made no profits either direct or indirect from the processing operations in the broad sense, it seems hardly consistent when faced with such admitted losses, to hold that the nonaffiliation condition, not contained in the Directive, but aided by the amendment, was

> "a reasonable and appropriate provision for carrying into execution the general policy laid down in the Directive of October 25, 1943."

6. The Court below did not consider the question of the validity of the defendant's regulation as interpreted and applied by it, when taken in conjunction with Revised Maximum Price Regulation No. 169, in aid of which it was enacted, which admittedly established maximum prices for wholesale cuts below the actual cost of many non-processing slaughterers, see *Edward Heinz et al.* v. *Bowles,* 149 F. (2d) 277, and also with the War Food Administrator's set-

aside Orders, or if it did give any consideration thereto, did not indicate it in its opinion.

That Court had previously gone to great lengths in the case of *Armour & Co.* v. *Bowles,* 148 F. (2d) 529, cert. denied 325 U. S. 871, to demonstrate how the maximum prices established by RMPR 169, although seemingly below the cost of production, could not be considered unlawful for the large integrated slaughterers who had shown considerable increases in their over-all profits due to the expanding profits from their processing departments. Also the Court encountered, as had the Price Administrator, much difficulty in the cost accounting problem of properly allocating to the slaughtering itself that portion of the processing profits which was in fact attributable to, or could not have come into being without, the by-products obtained from slaughtering.

The plaintiff has no problem of cost accounting (R. 10) and the difficulties encountered with the use of the so-called "cut-out" test are not here present. There are no over-all profits. There is a staggering loss which cannot be and is not disputed. The plaintiff's cost of livestock purchased upon the open market for slaughter was, *exclusive of any cost of slaughter, overhead or administrative expense, $10,743,042.26,* while its net sales of dressed beef, offal and hides, the only products it obtained from its slaughter, together with the regular subsidy received from defendant was $10,639,694.75, showing an out-of-pocket loss, without any allowance for the cost of slaughter, overhead or administration, of $103,347.51.

With such an admitted out-of-pocket loss produced in large part, if not entirely (R. 8, 9) by being compelled to sell a substantial portion of this slaughter to Government agencies under the War Food Administrator's set-aside Orders, at prices established by another Government agency

(RMPR 169), without the benefit of the special subsidy procured for non-integrated slaughterers in aid of the foregoing price regulation, but withheld from the plaintiff by the defendant, it is difficult to understand how any court could fail at least to comment upon the seeming unconstitutionality thereof or, in fact, recognize it. It clearly seems a taking of private property for public use without just compensation.

Conclusion

Since the questions presented are of general as well as great importance, involving the assumption of jurisdiction by a Federal Court contrary to the apparent mandate of Congress, the authority for and consequent validity of, together with the proper interpretation of, a subsidy regulation under which many hundred million dollars have been and are being paid out by the Government and the validity of regulations which treated together, as they were intended to be, appear to operate, in at least some instances in violation of the Constitution, the petition for writ of certiorari should be granted.

Respectfully submitted,

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